



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 16, 2014 Government Records Council Meeting

Jeffrey W. Sauter  
Complainant

Complaint No. 2014-187

v.

Township of Colts Neck (Monmouth)  
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council ("Council") considered the December 9, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not unlawfully deny access to the records responsive to the December 18, 2013 request because the Custodian in a timely manner disclosed the Fire Company's monthly business meeting sign in sheets for the months of January 2013 through July 2013 and certified that no sign in sheets exist for the balance of the year and the Complainant did not submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. *See also Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's January 31, 2014 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Custodian failed to provide a lawful basis for denying the records responsive to the January 31, 2014 request, the Custodian shall disclose to the Complainant copies of the Fire Company's monthly business meeting attendance sheets for the period August 2013 through December 18, 2013.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in**



**accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup> In the event no records documenting attendance at the Fire Company's monthly business meetings exist, the Custodian shall submit a legal certification to that effect in lieu of the certified confirmation of compliance.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 16<sup>th</sup> Day of December, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 17, 2014**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**Jeffrey W. Sauter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-187**

**v.**

**Township of Colts Neck (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Request dated December 18, 2013

Copies of Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for calendar year 2013.

Request dated January 31, 2014

Copies of Fire Company's monthly business meeting attendance sheets for the period August 2013 through December 18, 2013.

**Custodian of Record:** Robert Bowden, Clerk<sup>3</sup>

**Requests Received by Custodian:** December 19, 2013 and February 4, 2014

**Response Made by Custodian:** December 31, 2013

**GRC Complaint Received:** May 6, 2014

**Background<sup>4</sup>**

December 18, 2013 Request and Response:

On December 18, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian received this request on December 19, 2013. On December 31, 2013, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that he was disclosing to him on December 31, 2013 "...copies of the Monthly

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Joseph A. Clark, Esq., of Dilworth Paxson LLP (Red Bank, N.J.).

<sup>3</sup> The GRC has repeatedly determined that the Township Clerk here is responsible for the records held by the Fire Company. See Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2004-68 (May 2005); Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2005-07 (March 2006); and Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2013-239 (Interim Order April 29, 2014).

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Business Meeting sign in sheets for the seven-month period covering January 2013 through July 2013 for Fire Company No. 2.”

On January 6, 2014, the Complainant wrote to the Custodian to advise him that not all of the requested records had been disclosed. The Complainant asked the Custodian to tell him if any of the requested records do not exist. On January 19, 2014, the Complainant again wrote to the Custodian to ask him about the status of the five (5) months of records that were responsive to his request but not disclosed. On January 24, 2014, the Custodian responded stating that Fire Company officials advised him that “the seven business meeting sign in sheets provided represent the full extent of their records...”

#### January 31, 2014 Request and Response:

On January 31, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian received this request on February 4, 2014.<sup>5</sup> In the letter forwarding the OPRA request, the Complainant informed the Custodian that pursuant to the municipal code some form of record is required to be maintained for the monthly business meetings. To further clarify the January 31, 2014 request, the Complainant stated that in the event the records being requested are no longer used to record monthly business meeting attendance, he was seeking records in any format that were used to record attendance for the period August 2013 through December 2013. On February 19, 2014, the Complainant again wrote to the Custodian to ask him about the status of the five (5) months of records that he requested on January 31, 2014.

On February 25, 2014, the Custodian wrote the Complainant in reply to the Complainant’s letter dated February 19, 2014. The Custodian referenced the Complainant’s December 18, 2014 OPRA request and recapped the action he took in response to that request. The Custodian reiterated that the only records responsive to the Complainant’s December 18, 2014 request are the seven sign in sheets previously disclosed to the Complainant.<sup>6</sup>

#### Denial of Access Complaint:

On May 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted an OPRA request to the Custodian dated December 18, 2013 seeking the sign in sheets for the Fire Company’s monthly business meetings held during the 2013 calendar year. The Complainant states that on December 31, 2013, the Custodian disclosed to him the sign in sheets for January 2013 through July 2013. The Complainant further states that he made several inquiries with the Custodian in an effort to obtain the sign in sheets for the balance of the year; however, the Custodian informed him that the seven sign in sheets provided represented all of the Fire Company’s records that were responsive to the request.

The Complainant asserts the municipal code requires that some form of record be maintained for the monthly business meetings of the Fire Company; therefore, he stated he has

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<sup>5</sup> As evidenced by the municipal date stamp on Complainant’s letter forwarding the OPRA request.

<sup>6</sup> The Custodian did not make reference to, or otherwise acknowledge, the Complainant’s January 31, 2014 request.

reason to believe there are attendance sheets made in some format in order for the Fire Company to comply with the code. On January 31, 2014, the Complainant states that he submitted another OPRA request for the records he never received in response to his December 18, 2013 request. The Complainant states that in the event the sign in sheets were changed to another format, he drafted the January 31, 2014 request so as to seek records in any format that were used to record attendance for the period August 2013 through December 2013. The Complainant states that the Custodian wrote him on February 25, 2014 and told him that the records provided represent the entire file. The Complainant states that he believes the Custodian understood his request and knowingly denied him access to the requested records.

#### Statement of Information:

On June 16, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on December 19, 2013, and provided all records that he received from the Fire Company in response to the request on December 31, 2013. The Custodian also certifies that the Complainant wrote to him on January 6, 2014, to inform him that five months of sign in sheets were missing from the records that were disclosed. The Custodian certifies that on January 24, 2014, he wrote to the Complainant to notify him that the records provided “comprised the full record of documents in possession of the Fire Company.”

The Custodian further certifies that on or about January 31, 2014, the Complainant filed another OPRA request seeking the Fire Company’s business meeting sign in sheets for the period August 2013 through December 2013. The Custodian certifies that the Fire Company asserts that the practice of keeping attendance sign in sheets was discontinued as of August 2013. The Custodian included a certification dated June 13, 2014 from Fire Company President Kevin Ketelsen in support of the Custodian’s statements. Mr. Ketelsen certifies that on or about December 20, 2014 (sic), the Fire Company received a request for copies of sign in sheets for calendar year 2013 in connection with an OPRA request. Mr. Ketelsen further certifies that as of August 2013, the Fire Company no longer required business meeting sign in sheets. Mr. Ketelsen certifies that the records he provided in response to the request were sign in sheets through July 2013.<sup>7</sup>

The Custodian also contends that the Complainant’s request is overly broad and that custodians are not required to conduct research or create new records in response to an OPRA request. *Citing N.J. Builders Ass’n v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Bent v. Twp. of Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian attached several documents to the SOI, including a copy of the Complainant’s OPRA requests dated December 18, 2013 and January 31, 2014, as well as copies of correspondence between the Complainant and Custodian during the months of December 2013, January 2014 and February 2014. The Custodian also attached copies of the records he disclosed to the Complainant in response to the December 18, 2013 request.

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<sup>7</sup> Mr. Ketelsen attached as Exhibit A copies of Fire Company monthly business meeting sign in sheets for the months January 2013 through July 2013.

#### Additional Submissions:

On June 18, 2014, the Complainant submitted to the GRC a response to the SOI. The Complainant states that the Custodian's argument in the SOI relates only to the December 18, 2013 request. The Complainant emphasizes that the Custodian fails to address the January 31, 2014 request. The Complainant states that the December 18, 2013 request asked specifically for sign in sheets. The Complainant further states that the sign in sheets were made available to him and he picked them up on December 31, 2013; however, the sign in sheets were only for the first seven months of the year, not for the entire year as requested.

The Complainant states that the municipal code requires some form of record to be maintained for the monthly business meetings so that attendance points can be awarded to participants. For this reason, the Complainant stated that he filed a second OPRA request dated January 31, 2014, in which he removed the words "sign in" from the request and instead requested attendance sheets for the period August 1, 2013 through December 31, 2013. The Complainant states that the transmittal letter accompanying the request made it clear he was seeking the "...remaining 5 months in any format..." (Emphasis in original.) The Complainant states that the Custodian erred when the Custodian stated that the Complainant sought sign in sheets in his second OPRA request because that request does not contain such terminology.

#### **Analysis - Request dated December 18, 2013**

##### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified that the records responsive to the Complainant's request consisted of Fire Company monthly business meeting sign in sheets for the seven (7) month period January through July, 2013. The Custodian certified that he disclosed these records to the Complainant in a timely manner on December 31, 2013, and there is no dispute between the parties that said records were disclosed to the Complainant on that date.

The Custodian further certified that he received subsequent written inquiries from the Complainant asking for sign in sheets for the last five months of the year that the Complainant claimed were missing from the disclosure. The Custodian certified that on January 24, 2014, he wrote to the Complainant to notify him that with respect to the Complainant's December 18, 2014 request, the records provided comprised the full record of documents in possession of the Fire Company. The Custodian also provided a certification from Fire Company President Kevin Ketelsen, wherein Mr. Ketelsen confirmed that the Fire Company discontinued the use of monthly sign in sheets as of August 2013. The Complainant does not dispute the Custodian's assertion that the Fire Company may have discontinued the use of sign in sheets on or about August 2013. Indeed, the Complainant submitted his January 31, 2014 request for "attendance

sheets” in the event the Fire Company’s discontinued sign in sheets had been changed to another format.

The facts in the instant complaint are similar to those in Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Pusterhofer, the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, there is no dispute between the parties that the sign in sheets for the months of January through July, 2013 were disclosed to the Complainant on December 31, 2013. The Custodian certified that no sign in sheets exist for the remaining five months of 2013 and the Complainant did not dispute the Custodian’s certification.

Accordingly, the Custodian did not unlawfully deny access to the records responsive to the December 18, 2013 request because the Custodian in a timely manner disclosed the Fire Company’s monthly business meeting sign in sheets for the months of January 2013 through July 2013 and certified that no sign in sheets exist for the balance of the year and the Complainant did not submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. See also Pusterhofer, GRC 2005-49.

### **Analysis - Request dated January 31, 2014**

#### **Timeliness**

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>8</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the evidence of record reveals that the Custodian received the Complainant’s OPRA request dated January 31, 2014 on February 4, 2014; however, the Custodian failed to respond to said request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s January 31, 2014 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s

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<sup>8</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

The Complainant submitted his January 31, 2014 request to the Custodian via a transmittal letter of steady date. There is credible evidence in the record that the Custodian did receive the request: (1) a copy of the Complainant's transmittal letter was attached to the SOI and it was date stamped by the municipality as received on February 4, 2014, (2) a copy of the January 31, 2014 request was attached to the SOI, and (3) in paragraph 6 of the Custodian's June 9, 2014 certification attached to the SOI the Custodian acknowledges receiving the request on or about January 31, 2014. Despite the fact the Custodian was aware of the request; he failed to provide any lawful reason for denying access to the records sought by the Complainant.

The January 31, 2014 request asked for the Fire Company's monthly business meeting *attendance* sheets for the period August 2013 through December 2013 (emphasis added). The Complainant further clarified the request in the transmittal letter which accompanied the request by mentioning his understanding that the municipal code requires "...some form of a record...to be maintained of the monthly business meetings..." and accordingly he stated that attendance records in any format would be considered responsive to the request (emphasis in original.) There is no doubt that the Complainant is seeking copies of the records that the Fire Company started using as a replacement for the sign in sheets that were discontinued in August 2013. The Complainant asserted that a record in some form must be prepared to document attendance at the monthly business meetings in order for the Fire Company to comply with the municipal code.

Therefore, because the Custodian failed to provide a lawful basis for denying the records responsive to the January 31, 2014 request, the Custodian shall disclose to the Complainant copies of the Fire Company's monthly business meeting attendance sheets for the period August 2013 through December 18, 2013.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the records responsive to the December 18, 2013 request because the Custodian in a timely manner disclosed the Fire Company's monthly business meeting sign in sheets for the months of January 2013 through July 2013 and certified that no sign in sheets exist for the balance of the



year and the Complainant did not submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. *See also* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's January 31, 2014 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Custodian failed to provide a lawful basis for denying the records responsive to the January 31, 2014 request, the Custodian shall disclose to the Complainant copies of the Fire Company's monthly business meeting attendance sheets for the period August 2013 through December 18, 2013.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup> In the event no records documenting attendance at the Fire Company's monthly business meetings exist, the Custodian shall submit a legal certification to that effect in lieu of the certified confirmation of compliance.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

December 9, 2014

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<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.